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Exhaustion of Tribual Remedies Required for Habeas Corpus Review Under the Indian Civil Rights Act

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NOTE

EXHAUSTION OF TRIBAL REMEDIES REQUIRED FOR HABEAS CORPUS REVIEW UNDER THE INDIAN CIVIL RIGHTS ACT

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The Indian Civil Rights Act of 1968 (hereafter ICRA)[1] extends civil rights protections like those of the federal Bill of Rights to those affected by actions of Indian tribal governments. The substantive rights enumerated in the Act[2] are enforced initially, and often exclusively, in tribal forums. The only express remedy provided in the Act is the writ of habeas corpus in federal court.[3] The Supreme Court has accordingly held habeas corpus to be the sole federal avenue of relief under the Act in *Santa Clara Pueblo v. Martinez*.[4] The lower federal courts have since conformed their holdings on the question as well.[5]

Even before the *Santa Clara* decision limiting the federal remedy in respect of tribal sovereignty, federal courts had read a requirement of exhaustion of tribal remedies into those ICRA-based actions over which they had found jurisdiction under the aegis of federal question jurisdiction.[6] Hence, the Arizona district

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1. Specifically title I of the Act, *codified as* 25 U.S.C. §§ 1301-1303 (1982).

2. 25 U.S.C. § 1302 (1982). Its provisions are almost identical to the individual civil rights guarantees of the federal Constitution. For a comparison see, e.g., Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343 (1969). *See also* Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURV. HUM. RTS. L. 49 (1971).

3. 25 U.S.C. § 1303 (1982). The section reads: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."

4. 436 U.S. 49 (1978) (per Marshall, J.). The case represents more than strict statutory construction; it rests on strong federal policy recognizing the sovereignty (albeit "dependent") of Indian tribes. *Id.* at 62-63.

5. *Compare* Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971) (habeas corpus not exclusive jurisdictional basis for federal ICRA enforcement) *with* Johnson v. Frederick, 467 F. Supp. 956 (D.N.D. 1979) (habeas corpus action is exclusive remedy in federal courts, and all other actions must be brought in tribal courts).

6. *E.g.*, Dodge v. Nakai, 298 F. Supp. 26 (D. Ariz. 1969), citing 28 U.S.C. § 1331 (federal question), § 1343(1), (4) (civil rights), and § 1361 (mandamus). *See also* Burnett v. Rosebud Sioux Tribe, 1 T.C.R. [Tribal Court Reporter] A-51 (Rosebud Sioux Tribal Ct. 1978) (tribal election) (on remand from South Dakota District Court).

court in *Dodge v. Nakai*[7] relied heavily on federal policy supporting tribal self-government[8] in its listing of factors favoring (as well as opposing) tribal self-government.[9] Like many cases following it, however, *Dodge* stands as an exception to the rule supposed to have been established requiring the exhaustion of tribal remedies. The exhaustion doctrine in the ICRA/habeas corpus context thus stands as another example of a rule of law more often honored and defined in its breach than in its observance. This seems to be as true in the criminal habeas corpus cases as it was in pre-*Santa Clara* cases involving civil matters.

Policies Facing the Federal Courts

The habeas corpus petitioner may be a non-Indian, an Indian not a member of the tribe involved, or an individual tribal member. While he may be enrolled in an Indian nation whose political integrity deserves and is accorded deference, he will also enjoy United States citizenship[10] and be entitled to claim protection under the ICRA as a federal statute.[11] By the terms of the ICRA "any person" aggrieved by tribal action and challenging custody pursuant thereto possesses a right to test custody through a federal writ of habeas corpus (subject, of course, to such limitations as the exhaustion-of-tribal-remedies doctrine).[12] Any other ICRA actions are left to tribal forums.[13] When a petitioner presents a claim to the federal court that is ripe for review, that court is under a duty to exercise its jurisdiction under the ICRA. This is so regardless of whether the federal judicial review is seen

7. 298 F. Supp. 17 (D. Ariz. 1968). *Dodge v. Nakai* is the first federal case decided under the ICRA.

8. Citing Williams v. Lee, 358 U.S. 217 (1959).

9. 298 F. Supp. at 25. See discussion *infra*.

10. The federal Citizenship Act of 1924 (43 Stat. 253), 8 U.S.C. § 1401(a)(2), naturalized "Indians born within the territorial limits of the United States." Prior to that act, many Indians had been made U.S. citizens. *See* D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 495-99 (1979).

11. ICRA protection extends to all U.S. citizens, although its focus is the governmental actions taken by the Indian tribes. *See* Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J. LEGIS. 557 (1972); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 61 (1978) ("a central purpose of the ICRA . . . was to 'secure for the American Indian the broad constitutional rights afforded to other Americans'") *quoting* S. Rep. No. 841, 90th Cong., 1st Sess. 5-6 (1967).

12. 25 U.S.C. § 1303 (1982). See *supra* note 3.

13. Santa Clara Pueblo v. Martinez, 437 U.S. 49, 64 (1978); Trans-Canada Enter.,

to contribute to the greater good of the tribe as a political sovereign.

Individual federal courts may find habeas corpus review more readily available, in compensation for the lack of federal jurisdiction over civil complaints arising under the ICRA, or for some other reason, such as suspicion of the quality or integrity of tribal judicial systems. Whether this can be justified is a question resting on deeper political values—balancing policies favoring tribal self-government with some measure of accountability outside tribal governmental systems (such as accountability to be had in federal courts, as opposed to other federal forums). As a matter of law, however, both the plain statutory provisions of the ICRA and the mandate of *Santa Clara* clearly operate to limit the federal remedy to the writ of habeas corpus, and federal decisional law imposes the doctrine of exhaustion of tribal remedies as a matter of comity.

Exhaustion: Question of Comity

The exhaustion doctrine is an incident of the comity that exists between Indian tribes and the United States as sovereigns. That an ICRA claim may be brought into federal court only by way of the writ of habeas corpus is an instance of channeled subject-matter jurisdiction in the federal courts. The exhaustion doctrine, in the federal-state context as well as the federal-tribal context, often is treated as though it too involves subject-matter jurisdiction. In fact, the requirement of exhaustion does not go to federal jurisdiction but arises out of the notion of comity between sovereigns.[14]

The requirement of exhaustion of state remedies has its origin in *Ex parte Royall*,[15] a decision limiting the 1867 statutory federal jurisdiction that had made habeas corpus generally available to state petitioners. Justice Harlan wrote for the Supreme Court in this case: "We cannot suppose that Congress intended to compel those [federal] courts . . . to draw to themselves, *in the first instance*, the control of all criminal prosecutions commenced in

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Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980); Johnson v. Frederick, 467 F. Supp. 956 (D.N.D. 1979).

14. "The rule of exhaustion 'is not one defining power but one which relates to the appropriate exercise of power.'" Fay v. Noia, 372 U.S. 391, 420 (1963), *quoting* Bowen v. Johnston, 306 U.S. 19, 27 (1939).

15. 117 U.S. 241 (1886).

state courts. . . ."[16] As a result, the Court held, "salutary principles" of comity bestowed on the lower federal courts the discretion to decide whether to discharge a state prisoner[17] in the absence of "special circumstances requiring immediate action."[18]

The legal guidelines implementing the policy of comity tend to devolve into the political principles underlying the federal judiciary's vision of "our Federalism"[19] in the federal-state context. The respect of the sovereignty of the several states underlies the policy,[20] just as respect for the sovereignty of the Indian tribes leads to the application of the concept in the federal-tribal relationship. Comity, wrote Justice Black in his last term, is

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism." . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, *always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States*.[21]

Equitable principles of federalism thus stand in the stead of formalism, regardless of whether the latter has ever truly obtained in the United States.[22] In the federal-tribal context, the rationale

16. *Id.* at 251 (emphasis added).

17. In that case, state petitioners in custody awaiting trial.

18. 117 U.S. 241, 253 (1886).

19. The slogan "Our Federalism" was memorialized in Younger v. Harris, 401 U.S. 37 (1971) (Black, J.) (comity bars federal injunction of state criminal prosecutions begun prior to institution of the federal suit, except in extraordinary cases if necessary to prevent immediate irreparable injury).

20. *See generally* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4264 (1978).

21. 401 U.S. 37, 44-45 (1971) (emphasis added).

22. The suggestion that "equity" more nearly describes jurisprudence in the United States, past as well as present, is entirely gratuitous to this paper, although the point is related to the close relationship between federal Indian law and policy. Nonetheless, for an example of supporting scholarship, *see* Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892-915 (1982).

supporting the application of the exhaustion doctrine, as an expression of comity, is more powerful if seen as flowing not from the smooth functioning of a federalism but from the necessary settlement of fractious relations between previously independent sovereigns. Compare to Justice Black's explanation of comity the following language from Justice Marshall's majority opinion in *Santa Clara Pueblo v. Martinez*:

> As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority. . . .
>
> In addressing this inquiry, we must bear in mind that providing a federal forum for issues arising under [25 U.S.C.] § 1302 constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves," Fisher v. District Court, 424 U.S. 382, 387-388 (1976), may "undermine the authority of the tribal court . . . and hence . . . infringe on the right of the Indians to govern themselves." Williams v. Lee, supra, 358 U.S., at 223. . . .
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> Our reluctance is strongly reinforced by the specific legislative history underlying 25 U.S.C. § 1303. This history, extending over more than three years, indicates that Congress' provision for habeas corpus relief, and nothing more, reflected a considered accommodation of the competing goals of "preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people."[23]

The differences between the passages are more of style than substance.

The history of federal Indian law is replete with instances of judicial law making, unprincipled policy making by the executive branch or administrative agencies, and dramatic legislative responses to perceived economic and social circumstances. Yet throughout that history there has always been recognition, if not respect, for the original autonomy of the Indian tribes as

23. 436 U.S. 49, 62-67 (1978).

sovereigns. The balance of the relationship is thus not entirely unlike "our Federalism." The tribal-federal dialectic, however, flows from the subordination of the autonomous sovereigns. The extension of federal law then becomes an apology for, a description of, and a prescription for federal control. This is balanced against the support for Indian self-determination as an apology for, a description of, and a prescription for the survival of the Indian tribes.

That the judicial doctrine of exhaustion as an expression of comity should be even stronger in relation to tribes than it is in relation to states, then, emerges inevitably as a political opinion informed by history.

The discretion in the federal courts as to the availability of habeas corpus is a device that maintains the balance or the tension between federal and tribal sovereignties.[24] The restricted availability permits the retention by the tribes of a large degree of control over a great deal of substantive and procedural criminal law.

Waiver of the Exhaustion Requirement

In the evolution of the exhaustion doctrine in the federalism context, because the doctrine expresses comity, not subject-matter jurisdiction, it is possible for a state expressly to waive its defense that state remedies were not exhausted; it may even waive the question by failure to raise it in the federal district court.[25] The federal court does retain the discretion, however, to conduct its own inquiry into whether state remedies were exhausted.[26]

24. This is seen, for example, in the extent to which the substantive standards implementing the ICRA's bill of rights harmonize with the federal standards the ICRA was intended generally to extend to tribal actions. For a discussion of some of the effects on federalism of the availability of and limitations on habeas corpus review, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1042, 1047-49, 1052-54 (1977).

25. *See, e.g.*, Wiegand v. Seaver, 504 F.2d 303 (5th Cir. 1974), *cert. denied, app. dismissed*, 421 U.S. 924 (habeas corpus granted where state stipulated exhaustion of remedies would be futile); West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973), *aff'd in relevant part en banc*, 510 F.2d 363 (5th Cir. 1975); United States *ex rel.* Boyance v. Myers, 372 F.2d 111 (3d Cir. 1967) (state waiver given effect in interest of full and prompt adjudication of all matters in controversy). *But see* United States *ex rel.* Johnson v. Vincent, 507 F.2d 1309 (2d Cir. 1974), *cert. denied*, 420 U.S. 994 (though exhaustion requirement not jurisdiction but matter of comity, court may permit the issue to be first raised on appeal).

26. Zicarelli v. Gray, 543 F.2d 466 (3d Cir. 1976) (express state concession that remedies exhausted does not avoid a need for independent inquiry by the federal court);

Federal Jurisdictional Alternatives

Whether an alternate remedy to the writ of habeas corpus may yet exist is not addressed by this paper. In comparison, however, such an alternate remedy for state petitioners generally is considered to be unavailable, relegating them to pursuit of state remedies before they may avail themselves of the conventional federal habeas corpus route. The question whether an alternate basis for federal jurisdiction may credibly be found has been addressed by at least one writer.[27] Although that paper was published before the Supreme Court settled the question in practice, in *Santa Clara*, it is worth brief coverage. The paper considered 42 U.S.C. § 1983 as an alternative to civil rights jurisdiction of 28 U.S.C. § 1343(4), but found two major barriers: first, that section 1983 did not comprise a congressional waiver of tribal sovereign immunity, and second, that courts have refused to rule that a tribe is the equivalent of a state or territory for the purposes of section 1983.[28]

It has been said in one authoritative commentary that, apart from tribal remedies and federal habeas corpus review, ICRA guarantees may be enforced through defendants' claims in federal or state courts,[29] and will bind the Department of the Interior in its federal supervisory actions over tribes, such as approval of tribal legislation.[30]

The exhaustion doctrine, and indeed the restriction of federal remedies under the ICRA to habeas corpus review, should not be seen as judicial extinguishing of civil rights. Instead, the ICRA

Rose v. Dickson, 327 F.2d 27 (9th Cir. 1964) (same even when parties do not raise issue on appeal).

27. Note, *Remedies: Tribal Deprivation of Civil Rights: Should Indians Have a Cause of Action under 42 U.S.C. § 1983?*, 3 AM. INDIAN L. REV. 183-95 (1975). The equally interesting question whether an alternate cause of action might be sustained under 42 U.S.C. § 1985(3) is well beyond the scope of this paper. However, section 1985(3) carries its own substantive provisions and it is unlikely it could be construed to support ICRA substantive claims. It would have to be used in its own right (so to speak), no doubt, and its elements (e.g., requiring class-based animus) are unrelated to the ICRA guarantees.

28. Note, *supra* note 27, at 187. The note attempts to circumvent both stated barriers without (this author believes) much success. *Id.* at 187-91. To controvert either one is inimical to a basic proposition of federal Indian law: that congressional infringement on the tribes must be express.

29. F. COHEN'S FEDERAL INDIAN LAW 69 (Strickland et al., eds. 1982).

30. *Id.*, citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.22 (1978).

extended civil rights guarantees to those affected by tribal governmental action. Tribal forums, federal judicial and administrative enforcement forums, and potentially state forums have and will implement those guarantees.[31] The net impact of the ICRA's extension of civil rights standards is to bind Indian tribes as sovereigns in their actions, where previously the tribes had not been accountable to the strictures of another sovereign (i.e., had not been bound by the federal Constitution).[32] To limit the availability to petitioners of federal habeas corpus review is to limit the intrusion on tribal sovereignty posed by the ICRA. The limitation channels ICRA claims to tribal forums; for those in custody, initially to tribal forums, after which there remains the federal habeas corpus avenue of relief to follow the good-faith exhaustion of tribal remedies.

One consequence of the exhaustion doctrine is a limitation on the total number of cases heard in federal court involving criminal procedure under the ICRA. Some of those in tribal custody will obtain relief through tribal forums; others may be satisfied with tribal remedies regardless of whether their results are favorable. It seems likely, however, that a petitioner who was willing in the first instance to seek the federal writ—crossing such barriers as time, expense, cultural and geographic distance,[33] even language and literacy impediments, and possibly socio-political disapproval within the reservation toward those who upset the apple cart—will be likely to pursue tribal remedies and then return to the federal forum if still dissatisfied.

That tribal courts adjudicate most ICRA claims not only strengthens tribal self-government or sovereignty in general, but supports specific tribal institutions and increases the diversity of local interpretations of ICRA civil rights standards. Although the trend of tribal judicial forums is toward increasing formal struc-

31. See *supra* text accompanying notes 29-30.

32. *See* Note, *In Defense of Tribal Sovereign Immunity*, 95 HARV. L. REV. 1058, 1062-64 (1982). *Cf.* Santa Clara Pueblo v. Martinez, 436 U.S. at 62, set forth in pertinent part *supra* at text accompanying note 23.

33. Most Indian reservations are located in rural areas, far from federal and state courts. When county courts and justice courts are nearby, they are usually in border towns where hostility toward Indians may run high and sympathy for Indian values may be lacking. Thus Indian courts located on reservations have the advantages of being convenient to the persons who will use them and are the most likely forums to do justice in specific situations. *See* NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, INDIAN COURTS AND THE FUTURE 88-92 (D. Getches ed. 1978), reproduced in part in GETCHES, ROSENFELT & WILKINSON, *supra* note 10, at 317.

tures,[34] many appellate as well as trial court opinions are still not reported. Of these, some are not recorded, some are recorded only on audio tape, and many are given in the tribal language. The relative inaccessibility of much decisional law should contribute to its local diversity for some time.

Exhaustion Doctrine Before Santa Clara

In one habeas corpus case following the ICRA and preceding *Santa Clara* by nine years, a petitioner was permitted to proceed in federal court even though tribal remedies had not been exhausted. The appellate court in *Settler v. Yakima Tribal Court*[35] gave a draconian extension to the already broad conception of "custody"[36] in order to hear the case.[37] Because tribal remedies had not been exhausted, the federal court should have ruled the claim not ripe for review and remanded for continued pursuit of tribal appellate proceedings.[38] Even had some implied or express waiver by the tribe of the defense of lack of exhaustion occurred, an independent judicial inquiry into the circumstances of the case should have found no basis to except it from the exhaustion requirement.

It may be suggested that the Ninth Circuit was influenced in *Settler* by the belief that the Yakima Tribal Court was a federal instrumentality because of federal involvement in and responsibility for its existence. Although it is very likely that factor was determinative to the result, it should not have been. Even had the tribal court properly been analogized to a federal administrative court, the petitioner's claim was not ripe for federal habeas corpus review because tribal remedies had not fully been pursued.

Civil cases had also been held subject to the exhaustion requirement. Federal courts in a number of cases had dismissed for failure to exhaust tribal remedies.[39]

34. See discussion *infra* in text accompanying notes 85-88.

35. 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970).

36. In other federal habeas corpus cases a very broad conception of "custody" has developed. *See, e.g.*, Hensley v. Municipal Court, 411 U.S. 345 (1973) (state prisoner already released on own recognizance); Peyton v. Rowe, 391 U.S. 54 (1968) (petitioner's sentence was to be served in the future).

37. The petitioner in *Settler* had received merely a fine at the hands of the Yakima Tribal Court and had posted bond pending appeal. The Ninth Circuit's ruling as to custody is questionable, especially as it raises questions similar to those involved in the exhaustion doctrine, to wit, recognition of tribal appellate avenues of relief.

38. *Cf.* Burnett v. Rosebud Sioux Tribe, 1 T.C.R. A-51 (Rosebud Sioux Tribal Ct. 1978) (on remand from South Dakota District Court for exhaustion of remedies).

39. *E.g.*, O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140 (8th Cir. 1973);

The lack of pursuit of tribal remedies in *Dodge v. Nakai*[40] was quite plain: the plaintiffs admitted they had never presented their claims before the Navajo Tribal Court.[41] In this first case under the ICRA, the district court read an implied exhaustion requirement[42] into the Act. Nonetheless it held that the requirement did not have to be met in the case before it.[43] It reasoned that because a number of claims were involved, the "policies giving rise to the concept of pendent jurisdiction"[44] permitted an exception to be made.

The court listed the following factors in support of its implication into the ICRA of the exhaustion doctrine:

(1) A perceived strong congressional policy to vest the Navajo tribal government with responsibility for its own affairs, citing *Littel v. Nakai*.[45]

(2) A "recognized federal policy" to enhance the development of an independent Indian judiciary, citing *Williams v. Lee*.[46]

(3) A general observation that: "No doubt many of these cases could be resolved locally."[47]

The court went on to cite factors it believed would "militate against the implication of a condition of exhaustion"[48] into the ICRA. The first is peculiar to the case before the court: several of the defendants were non-Indian "and, as such, would not be proper parties in a tribal court."[49] The second factor reached to the

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Jacobson v. Forest County Potawatomi Community, 389 F. Supp. 994 (E.D. Wis. 1974). *See generally* COHEN, *supra* note 29, at 669.

40. 298 F. Supp. 17 (D. Ariz. 1968).

41. *Id.* at 25.

42. As well, of course, as a federal-question basis for civil jurisdiction. *Id.*

43. The case involved an action by a non-Indian lawyer (director of the Navajo Legal Services Program). That may have influenced the court as well. *Id.* at 26.

44. *Id., citing* UMW v. Gibbs, 383 U.S. 715 (1966).

45. 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966). *Littel* involved an action on a contract brought by a non-Indian lawyer (general counsel to the Navajo Tribe). The Ninth Circuit held the case was within the exclusive jurisdiction of the Navajo tribal courts. *Id.* at 490. The case preceded passage of the ICRA.

46. 358 U.S. 217, 222 (1959).

47. 298 F. Supp. at 25.

48. *Id.* at 25-26.

49. *Id.* at 26. It must be noted that some argue that non-Indians are not only proper parties plaintiff in tribal court, *see* Littel v. Nakai, 344 F.2d 486 (9th Cir. 1965), but under many circumstances, proper parties defendant as well. *See generally* COHEN, *supra* note 29, at 252-57, 342-43. It may be that in Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968), the parties would have so aligned in the tribal court that the non-Indians would have been parties plaintiff with their claimed violations of the ICRA.

Act's legislative history to show that Congress had been concerned about providing effective remedies for the rights established in the Act.[50] Finally, the court added that to require an exhaustion of tribal remedies in the case would result in complex litigation since some of the claims before it would continue while others might reappear following tribal court rulings.

The first two factors run counter to the ICRA's legislative history. The ICRA covers all persons, including non-Indians, and Congress was interested in "avoiding undue or precipitous interference in the affairs of the Indian people."[51] Such interference occurs when federal courts take on habeas corpus claims while tribal courts lose an opportunity to adjudicate issues involving tribal governmental actions. The third factor is at least credible, although the court should have given further thought to how it might handle the case by retaining its non-ICRA claims while the tribal court took the ICRA-related aspects. The case was far from a paradigm of complex litigation and retention of jurisdiction pending resolution of claims in other forums (tribal, state, administrative, or arbitrative) is far from unknown.

In effect, then, the court in *Dodge* propounded a balancing test in its requirement of exhaustion of tribal remedies, resting on facts peculiar to the case before it. Whatever the merit of the third factor of the considerations underlying pendent jurisdiction, it is not applicable to the habeas corpus cases. Criminal habeas corpus claims are not directed to non-Indian parties respondent. They are also unlikely to involve questions not properly before the tribal courts.

After *Dodge v. Nakai*, habeas corpus cases in federal courts were held subject to the exhaustion doctrine although exceptions were often found. Further, in some cases the question was not discussed, even though an examination of the facts indicates tribal remedies were not exhausted and the federal district court should have conducted its own inquiry into the matter.

In *Big Eagle v. Andera*,[52] for example, the South Dakota district court examined some interesting issues (whether tribal ordinances were vague or overly broad) without pausing to discuss

50. The Supreme Court in *Santa Clara* looked to the same legislative history to find support for its general restriction of federal remedies to habeas corpus review. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

51. *Id.* at 67 (citing Summary Report II).

52. 418 F. Supp. 126 (D.S.D. 1976). The case was on remand from the Eighth Circuit, 508 F.2d 1293, 1297, for an evidentiary hearing on the Crow-Creek Sioux Tribal Court's construction of the disorderly conduct ordinance.

exhaustion of tribal remedies. Both petitioners had appeared in tribal court and had pled guilty to the charges, and approximately one month later filed habeas corpus petitions under 25 U.S.C. § 1303. They had not contested the validity of the tribal disorderly conduct ordinances to the tribal trial or appellate forum. There is no indication that a meaningful tribal remedy did not exist. The subject matter centered on tribal legislation and the tribal court's construction thereof; thus the tribal courts were more appropriate for adjudicating the claims before they were entertained in federal court.

A relatively conventional exception to the rule of exhaustion was found in *Wounded Knee v. Andera*[53] on the basis that the tribal remedy was exhausted for practical purposes and further motions by the petitioner would have proved futile. The petitioner had contested the practice of having the tribal judge act in the dual capacity of both tribal judge and prosecutor, under ICRA rights to a fair and impartial trial and to due process of law. She had made the claim before the tribal court and had attempted to appeal according to the Crow-Creek Tribal Code six months before she filed her petition for a writ of habeas corpus.[54]

The case was heard by the district court judge who had heard *Big Eagle v. Andera*,[55] Judge Bogue. The first hearing was held eighteen days before the opinion in *Big Eagle* was issued. Possibly because the tribe or its counsel had gained experience from the previous case, it appears to have raised the defense of the exhaustion requirement and Judge Bogue turned first to whether exhaustion of tribal remedies was required.[56] The petitioner argued that the ICRA's provision for habeas corpus,[57] unlike the federal habeas corpus statute applying to state prisoners,[58] contains no explicit language requiring exhaustion of

53. 416 F. Supp. 1236 (D.S.D. 1976).

54. *Id.* at 1237-38.

55. 418 F. Supp. 126 (D.S.D. 1976). Judge Bogue's opinion in *Wounded Knee*, 416 F. Supp. 1236 (D.S.D. 1976), was issued Aug. 13, 1976; the hearing in the latter was held July 8, 1976.

56. Irma Wounded Knee had filed a petition for appeal with the clerk of the tribal court, who was directed by the tribal code to forward it to the "chief judge." Judge Andera was the only tribal judge on the reservation, although Elnita Rank, chairperson of the tribe, testified that she would have set the machinery in motion to construct an appellate tribunal had the matter come to her attention. 416 F. Supp. at 1238.

57. 25 U.S.C. § 1303 (1982), set forth *supra* note 3.

58. 28 U.S.C. § 2254(b) (1982).

remedies; thus no such exhaustion should be required by the courts.

The court considered the petitioner's attempt to argue strict statutory construction:

> The argument seems logical enough, and if we had only the statutes and no case law, we might be inclined to accept it. This Court concludes, however, that the case law which has arisen under the Indian Civil Rights Act evidences a very strong policy favoring exhaustion of all tribal remedies before federal courts get involved in tribal disputes and we conclude there is no reason to cast aside the exhaustion doctrine when petitions for writs of habeas corpus are filed. This Court holds explicitly that tribal remedies must be exhausted before petitioning in federal court for a writ of habeas corpus.[59]

The court phrased its holding as it did because it applied ICRA civil case law to the habeas corpus petition before it. Had no case law yet arisen applying the exhaustion doctrine to ICRA claims, however, the court should not have accepted the petitioner's argument. The doctrine of exhaustion of remedies, as a matter of comity in federalism, was originally fashioned judicially[60] and was codified only later. The Ninth Circuit, furthermore, had already resolved the "strict construction" argument in an ICRA habeas corpus case cited by Judge Bogue.[61] The latter case also held that exhaustion is normally required in habeas corpus proceedings from tribal court.

Judge Bogue relied on *Janis v. Wilson*[62] where the exhaustion doctrine as applied to *potential* tribal remedies was controlling: "The invocation of this power [federal] necessary for the efficacy of the Indian Civil Rights Act is, however, ordinarily conditioned on the exhaustion of tribal remedies, both administrative and judicial."[63] Hence, the tribal remedy need not be to appellate court, or formal; it need only be meaningful.

59. 416 F. Supp. 1236, 1238 (D.S.D. 1976).

60. *Ex parte* Royall, 117 U.S. 241 (1886), discussed *supra* text accompanying notes 15-18.

61. United States *ex rel.* Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975).

62. 385 F. Supp. 1143 (D.S.D. 1974).

63. *Id.* at 726-27.

Oddly, Judge Bogue cited *O'Neal v. Cheyenne River Sioux Tribe*[64] as "[t]he seminal case in this area . . . wherein the Eighth Circuit examined the congressional policy behind the Indian Civil Rights Act and determined that generally plaintiffs who do not exhaust tribal remedies in civil disputes with a tribe are prohibited from bringing suit in federal court."[65]

Whether pursuit of tribal remedies would be meaningful is an important element of the exhaustion doctrine, as is appropriate for an equitable comity-based judicial doctrine. In *Wounded Knee v. Andera* the court considered this factor at length, as its second concern, before proceeding to the merits of the petitioner's claim. The court's determination was based on factual inquiry, but noted several other ICRA civil cases in support of its conclusion that Wounded Knee had "as a matter of law exhausted her tribal remedies."[66]

> Any remedy potentially available to Petitioner through the tribal appellate process was rendered ineffective and meaningless by official delay and inaction. Therefore, the requirements of exhaustion in this case have been met, and this Court will proceed to the merits.
>
> We will state first, however, that our conclusion as to the efficacy of the appeal procedure on the Crow Creek Reservation is not intended to discredit the system of justice now operating there. . . . This Court urges the tribe to implement and refine the appellate procedure authorized in the Crow Creek Tribal Code. . . . The defect was not with the Tribal Code nor with the character of the persons involved; rather, there has simply been no recent, serious effort to make the appellate court a reality. Until such an effort is successfully made, the tribal court itself is the court of last resort on the Crow Creek Reservation.[67]

As a general rule, the court said, proof that resort to remedies provided by the tribe would be futile will excuse the petitioner from "go[ing] through the motions of exhaustion."[68] This may occur when a tribal remedy provided in theory is nonexistent in

64. 482 F.2d 1140 (8th Cir. 1973).

65. Wounded Knee v. Andera, 416 F. Supp. 1236, 1238 (D.S.D. 1976).

66. *Id.* at 1239.

67. *Id.* at 1240.

68. *Id.* at 1239, *citing* Rosebud Sioux Tribe v. Driving Hawk, 534 F.2d 98 (8th Cir. 1976); Janis v. Wilson, 521 F.2d 724, 729 (8th Cir. 1975).

fact, or at best inadequate, as was the case for Wounded Knee.[69]

The "meaningfulness" exception in the exhaustion doctrine is well established in habeas corpus law. It was aptly applied in another case decided by the Eighth Circuit a year later, *Necklace v. Tribal Court of Three Affiliated Tribes*.[70] The circuit court remanded for further proceedings in the case, primarily on the basis that the tribal laws contained no formal procedure for habeas corpus to which the petitioner could resort. The court was clearly influenced, however, by the fact that the petitioner had been confined for approximately five years in the North Dakota State Hospital pursuant to the tribal court's involuntary commitment order.

> While it appears that there are informal procedures by which Necklace might seek relief in the tribal courts, it further appears that the laws of the TAT [Three Affiliated Tribes] contain no formal habeas corpus procedure. Under these circumstances, we hold that Necklace is not required to exhaust her tribal remedies.[71]

The better reading of this language is to take the reference to "circumstances" to specify Necklace's lengthy confinement. That tribal avenues of relief were informal court procedures should not have been dispositive; there was no showing that resort to them would have been futile. The court acknowledged "as a matter of comity, that tribal remedies must ordinarily be exhausted before a claim is asserted in federal court under the Indian Civil Rights Act,"[72] and referred to a balancing process weighing "the need to preserve the cultural identity of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights."[73] Hence, not the informality of tribal remedies but the petitioner's need for immediate, certain hearing of her claim, was dispositive.

Indeed, Necklace's habeas corpus petition was unfortunately delayed because the North Dakota District Court had dismissed it

69. 416 F. Supp. 1239, *citing* Means v. Wilson, 522 F.2d 833 (8th Cir. 1975); Schantz v. White Lightning, 502 F.2d 67, 70 n.6 (8th Cir. 1974); Brown v. United States, 486 F.2d 658 (8th Cir. 1973).

70. 554 F.2d 845 (8th Cir. 1977).

71. *Id.* at 846.

72. *Id.*

73. *Id.*, *quoting* O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973).

for failure to exhaust *state* remedies.[74] The Eighth Circuit made short shrift of that, however, noting that the petitioner was not in custody pursuant to a state court judgment. The confusion at the trial level had evidently occurred because Necklace was confined in a state institution.

Civil Cases After Santa Clara

The initial question that must be posed in federal court treatment of ICRA-based civil cases is whether the court may take jurisdiction at all. Some federal courts have treated the question as if it were a matter of comity, and not of jurisdiction.

In an action reminiscent of *Dodge v. Nakai* and with a decision displaying similar thinking, the Tenth Circuit gave the nod to an action by non-Indians for damages in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes*.[75] Its decision was based primarily on the fact that a tribal forum was apparently denied the plaintiffs. The court also referred to the character of the plaintiffs as non-Indian and said that "the issue relates to a matter outside of internal tribal affairs."[76]

Unavailability of a tribal forum should not have persuaded the circuit court; it was the clear holding of *Santa Clara* that only habeas corpus cases may properly be before federal courts under the ICRA.[77] It is not for the courts of one sovereign to assume cases they find to be without forum in another sovereign's legal system. Because the Indian tribes are "dependent sovereigns," they are subject to the ICRA and it is Congress that has plenary power over the tribes. Thus it is for Congress to decide whether federal remedies additional to habeas corpus are required to accomplish its purposes.

As discussed previously, that the plaintiffs were non-Indian also should not have been persuasive.[78] They would have been proper parties plaintiff before the tribal court, and it is very likely that informal tribal procedures were available. It should have been much more important to the federal court that it subjected an Indian nation to a civil suit for damages. Going to the merits, the issue of whether a taking occurred on the tribe's reservation

74. *Id.* at 845.

75. 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981).

76. *Id.* at 685.

77. 436 U.S. 49, 69-71 (1978).

78. See *supra* note 49 and *supra* text accompanying note 51. *See also* Burnett, *supra* note 11.

land that may have damaged the plaintiffs' business adjacent to the reservation no doubt involved questions most competently reviewed in some tribal forum, whether formal or informal, judicial or otherwise.

Finally, that tribal activity on reservation land was the basis of the action brings the subject-matter patently within the purview of the tribe. Activities on reservation land, and certainly tribal activities thereon, have long been recognized to be a traditional basis for tribal civil jurisdiction.[79] The *Dry Creek Lodge* decision has been severely criticized.[80]

Yet *Dry Creek Lodge* has been perceived by one district court to state a rule of access to federal court involving solely the factor of availability of a tribal forum. The Utah District Court in *Kenai Oil & Gas, Inc. v. Department of the Interior*[81] dismissed the claim before it on the basis that no ICRA violation had been alleged. Nevertheless it chose to cite *Dry Creek Lodge* to support its statement in dictum that "where no tribal remedy is available a plaintiff may have access to a federal forum" for an ICRA civil claim.[82] Ultimately, if that federal forum is Congress, perhaps this is so, but taken as intended, the statement is an unfortunate one. Not only does it purport to offer a basis for federal jurisdiction unsupported by the ICRA, the pertinent case law,[83] or much of federal Indian policy, but it is a broad statement unnecessary to the case.[84]

More fortunately, because the court dismissed the claim, its interpretation of *Dry Creek Lodge* and hence its rejection of *Santa Clara*'s result are pure dictum. The opinion carries no weight of its own accord.

Intertribal Court System

Tribal judicial as well as legal systems are developing structurally; a recent creative example is the Northwest Intertribal

79. *E.g.*, Montana v. United States, 450 U.S. 544 (1981), and cases cited therein. *See generally* COHEN, *supra* note 29, at 246, 252-57.

80. "The decision seems clearly wrong." COHEN, *supra* note 29, at 668 n.52.

81. 522 F. Supp. 521 (D. Utah 1981), *aff'd* 671 F.2d 383 (10th Cir. 1982).

82. *Id.* at 530.

83. *See, e.g.*, R.J. Williams Co. v. Fort Belknap Housing Auth., 509 F. Supp. 933 (D. Mont. 1981) (rejecting reasoning and result of *Dry Creek Lodge*). *See generally* Note, *Indian Sovereignty and Judicial Interpretations of the Indian Civil Rights Act*, 1979 WASH. U. L.Q. 897, 912-18 (1979).

84. Although the court would have required that a plaintiff affirmatively show that a tribal remedy had been sought and proven unavailable. *Kenai*, 522 F. Supp. at 529-30.

Court System. It was set up to provide an appellate forum[85] for fourteen tribes in the state of Washington.[86] This interesting system provides trial court support as well to most of the tribes, as it became apparent such a need existed after the intertribal court system had originally begun as an attempt by the Quinault Tribe to create a cooperative circuit appellate court.[87] Whereas trial court support is to be provided on site, appeals cannot always be held locally because several appeals must be heard at each sitting. The three-judge appellate panels apply the substantive and procedural laws of the appropriate host tribes and travel from reservation to reservation so that all participating tribes may witness their hearings.[88]

A survey of Indian tribal codes[89] indicates that many tribes have developed formal provisions for appeals from tribal trial court decisions.[90] As tribal appellate remedies, these provisions are generally quite liberal, although some limitations are provided, such as a limitation on the amount of time within which an appeal may be made. Where such provisions are overly limited, however, an appealing party may look to the ICRA in its own tribal forum for relief.

An interesting illustration of this proposition is provided by the case of *Navajo Nation v. Browneyes.*[91] This case involved a successful challenge to a provision of the Navajo Tribal Code that limited appeals to cases in which the sanctions imposed exceeded a fine of $26 or a sentence of fifteen days in jail.[92]

Appellant Browneyes had received a suspended sentence, and on that basis his first appeal to the Navajo Court of Appeals was dismissed. On his motion for reconsideration, however, the court agreed to hear Browneyes's claim that the limitation on appeals

85. Report on the Northwest Intertribal Court System, 1 T.C.R. B-68, B-71 (1979).

86. Chehalis, Lummi, Muckleshoot, Nisqually, Port Gamble, Puyallup, Quinault, Sauk-Suiattle, Shoalwater Bay, Skokomish, Squaxin Island, Suquamish, Swinomish, and Upper Skagit. Each contributes to a three-judge appellate panel structured so that no member of any panel will be associated with the case at hand.

87. 1 T.C.R. B-68, B-71 (1979).

88. *Id.* at B-68, B-71 to -72.

89. A very useful compilation in microform of the codes is INDIAN TRIBAL CODES (R. Johnson ed. 1982).

90. It is not uncommon to find provisions specifying appeal, not to a tribal court, but to the tribal council or a court created specially by the council (the latter especially when the tribe is a party).

91. 1 T.C.R. A-86 (Ct. App. Navajo Nation 1978).

92. N.T.C. § 172 (§ 302, 1977 compilation). The limitation was designed apparently to stem a feared tide of appeals.

in the Navajo Tribal Code was violative of equal protection under the ICRA. This was a claim some federal courts would have taken on a writ of habeas corpus on the basis that the tribal code provision prevented Browneyes from pursuing his tribal remedy. The better place for the claim, however, was the Navajo Court of Appeals.

The court agreed that equal protection required dissolving the code provision because it limited appeals. First, the court said that equal protection requires that any classification rest on "'real and not feigned differences.'"[93] Second, the court said that such a classification must bear a reasonable relationship to the "'persons dealt with and to the public purposes sought to be achieved.'"[94] The court explained that:

> To say that an appeal does not present an issue worthy of appellate consideration merely because the sentence is less than 15 days in jail or less than $26 is to ignore the fact that judges may make mistakes even when small sentences or judgments are given.
>
> In that the Rules of Appellate Procedure require substantial grounds for an appeal to be stated, the number of appeals is limited to those that present genuine issues.[95]

The rule that an appeal present a genuine issue is somewhat comparable in theory to the rule in federal habeas corpus practice affecting state prisoners, though in practice it is probably more liberal. A petitioner in state custody, for example, who fails to comply with a state contemporaneous objection requirement must clearly establish the existence both of cause for that failure and actual prejudice to the defendant from the procedural default.[96]

93. *Id.* at A-88, *quoting* Walters v. City of St. Louis, 347 U.S. 231 (1954).

94. Navajo Nation v. Browneyes, 1 T.C.R. at A-88, *quoting* Champlin Ref. Co. v. Cruse, 115 Colo. 329, 173 P.2d 213 (1946). It has been suggested that the Navajo appeals court's use of authority in *Browneyes* was overly conservative, and that it need only have considered some less confining balancing test weighing the scope of individual rights against "the legitimate interests of the tribe in maintaining the traditional values of their unique governmental and cultural identity." Case Comment, 1 T.C.R. at A-90, *quoting* Janis v. Wilson, 385 F. Supp. 1143, 1150 (D.S.D. 1974). It is not extraordinary, however. The quoted language above relates only generally to the scope of the individual rights enumerated in the ICRA; the Navajo court wanted statements interpreting equal protection in particular. The doctrine of equal protection has developed with virtually identical standards in the various jurisdictions within the United States.

95. 1 T.C.R. at A-88.

96. Wainwright v. Sykes, 433 U.S. 72 (1977).

Because of the judicially created requirement that an alleged violation has resulted in actual prejudice to the defendant, the rule that a petition for appeal must present a "genuine issue" will effectively screen out many claims that would also be barred from federal habeas corpus relief.

Thus frivolous claims should largely be prevented under both these types of rules of appellate procedure and the federal judicial gloss on habeas corpus. It is the latter, of course, that created the exhaustion doctrine well before it was written into the federal Judicial Code in 1948.[97] Federal courts do, however, potentially provide review to a petitioner whose appeal petition to the appeals court of the tribe is conclusively denied, as well as for those whose tribal appeal is unsatisfactory in result.

Conclusion

In sum, the requirement of exhaustion of tribal remedies is a judicially created safeguard. It is appropriate because it harmonizes with the tenor of the ICRA and the intent of *Santa Clara Pueblo v. Martinez*. It is, moreover, beneficial because it effectuates the federal Indian law policy of according the concomitants of sovereignty to the tribal governments.

The underpinnings of tribal sovereignty are even more compelling than that of the several states upon which the exhaustion of local remedies doctrine is premised. The policies and law militating in favor of exhaustion of tribal remedies also appropriately enlighten the judicial approach in other areas of Indian law. The tribal judicial systems generally, like other tribal governmental instrumentalities, are growing stronger and should not be regarded as mere fledgling institutions in the administration of justice.

97. 28 U.S.C. § 2254(b), (c) (1982). *See* WRIGHT, MILLER & COOPER, *supra* note 20, at § 4264. *See generally Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1093-1103 (1970).